No. 14-1457

IN THE

Supreme Court of the United States

BRANDON THOMAS BETTERMAN,

Petitioner,

v.

MONTANA,

Respondent.

On Writ of Certiorari to the Supreme Court of Montana

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit voluntary professional association of lawyers who practice criminal law before virtually every state and federal bar in the country. NACDL is dedicated to promoting a rational and humane criminal justice system. NACDL was founded in 1958 to promote criminal law research, to advance and disseminate knowledge in the area of criminal practice, and to encourage integrity, independence, and expertise among criminal defense counsel. NACDL has more than 10,000 members who include private criminal defense attorneys, public defenders, and law professors, and up to 40,000 with affiliates. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers.

Given its institutional goals, NACDL's interest in and knowledge of the issues pertinent to this particular case are significant. As lawyers committed to ensuring proper, fair, and constitutional administration of criminal justice, NACDL is familiar with the anxiety, concern, prejudice, and oppressive conditions defendants experience when they do not receive a speedy trial. Particularly, NACDL has observed the issues that arise when, after pleading guilty, defendants are not sentenced swiftly.

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[1] Pursuant to Rule 37.6, *amicus* affirm that no counsel for any party authored this brief in whole or in part, and no person or entity has made any monetary contribution intended to fund the preparation or submission of this brief. Each party's written consent to the filing of *amicus* briefs has been filed with the Clerk's office.

INTRODUCTION

The right to a "speedy trial" is "one of the most basic rights preserved by our Constitution." *Klopfer* v. *North Carolina*, 386 U.S. 213, 226 (1967). For reasons rooted in history, practicality, and constitutional structure, this Court should hold that this most basic right protects against delays in sentencing.

In keeping with the Framers' intent to adhere to the "common-law ideal of limited state power," *Blakely* v. *Washington*, 542 U.S. 296, 313 (2004), the speedy trial guarantee ensures that a citizen's adjudication of his or her fate occurs swiftly and without unwarranted delay. In today's criminal justice system, for all but a few criminal defendants, the only adjudication a citizen receives is at his sentencing. The individual's protection against indefinite incarceration without an adjudication of whether and to what extent his conduct warrants incarceration is a fundamental protection of individual liberty.

All of the interests this Court has identified as protected by the Speedy Trial Clause at the guilt phase equally require protection at the sentencing phase. See *Barker* v. *Wingo*, 407 U.S. 514, 532 (1972). Delays in sentencing are oppressive, even for those who ultimately receive long sentences, because they serve their presentence time in jails, which are not designed for extended confinement, and do not provide basic programs, medical care, or safety. Delays in sentencing also exacerbate anxiety when, as is usually the case, the range of sentences for a given crime remains substantial. And delays also impair a defendant's preparations for his sentencing case by undercutting a defendant's ability to challenge alleged sentencing enhancements and to present mitigation evidence; by restricting the ability to serve concur-

rent sentences; and by undermining the right to appeal.

The Due Process Clause alone cannot fully protect these interests. The Due Process Clause, unlike the Speedy Trial Clause, requires a showing of prejudice before a court may award relief. See *Moore* v. *Arizona*, 414 U.S. 25, 26 (1973). Many of the interests above, however, do not easily translate into a form of prejudice that can be demonstrated *before* sentencing (or even on appeal after sentencing has finally taken place). In particular, a defendant with a meritorious appeal cannot bring that appeal until sentencing is complete. But demonstrating the prejudice suffered through a lengthy presentence incarceration before appeal would be nearly impossible, and proving it afterward would be an empty gesture.

ARGUMENT

I. GUILT-DETERMINATION AND SENTENCING HISTORICALLY WERE INSEPARABLE, AND SPEEDY TRIAL PROTECTIONS APPLY TO BOTH.

A faithful application of the Framers' understanding of a criminal "trial" dictates that the constitutional protections that ensure a "speedy trial" must include the sentencing phase of criminal adjudication.

At the time of the Framing, a defendant's "trial" was limited to a single adjudication, and sentencing occurred simultaneously with the determination of guilt. See *Apprendi* v. *New Jersey*, 530 U.S. 466, 479 (2000) (explaining that "[t]he substantive criminal law . . . prescribed a particular sentence for each offense" and "[t]he judge was meant simply to impose that sentence . . . ."); see also *Alleyne* v. *United States*, 133 S. Ct. 2151, 2158-59 (2013); Carissa Byrne

Hessick & F. Andrew Hessick, *Recognizing Constitutional Rights at Sentencing*, 99 Cal. L. Rev. 47, 51 (2011) ("During colonial times and at the Founding, the process of sentencing was virtually indistinguishable from the process of conviction."). It was to that sole adjudication that the speedy trial right—"one of the most basic rights preserved by our Constitution," *Klopfer*, 386 U.S. at 226—necessarily attached.

Today, however, the only contested adjudicatory process that most criminal defendants undergo occurs at sentencing. See *Missouri* v. *Frye*, 132 S. Ct. 1399, 1407 (2012) ("[O]urs 'is for the most part a system of pleas, not a system of trials . . . .'") (quoting *Lafler* v. *Cooper*, 132 S. Ct. 1376, 1388 (2012))). In fact, "[n]inety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas" *id.*, and do not involve a guilt-phase trial; for those cases, a separate hearing on sentencing is set for a later date. See Daniel Epps, *The Consequences of Error in Criminal Justice*, 128 Harv. L. Rev. 1065, 1114 (2015) (noting that 95% of criminal cases are resolved through plea bargaining); United States Sentencing Comm'n, *2014 Sourcebook of Federal Sentencing Statistics* (Figure C) (USSC) (showing that, in 2014, 97.1% of Federal criminal cases were resolved through pleas).[2]

The modern transformation of criminal adjudication into a system marked overwhelmingly by sentencing (rather than guilt) adjudications should not render the speedy trial right a nullity for the 95% of individuals who enter plea agreements. Otherwise, the constitutional guarantees of a "speedy" determi-

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[2] *Available at* http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2014/FigureC.pdf.

nation of one's fate and the protection against uncertain detention would no longer have meaning for any citizens besides the scant few who now proceed to a guilt-phase trial, which could not be what the Framers intended. Cf. *United States* v. *Jones*, 132 S. Ct. 945, 947 (2012) (interpreting the Fourth Amendment and emphasizing that the Court must "'assur[e] preservation of that degree of [protection] against government [liberty deprivation] that existed when the . . . Amendment was adopted." (quoting *Kyllo* v. *United States*, 533 U.S. 27, 34 (2001))); *Giles* v. *California*, 554 U.S. 353, 375-76 (2008) (same regarding Sixth Amendment's Confrontation Clause).

II. THE INTERESTS SET FORTH IN *BARKER* REQUIRE PROTECTION AT SENTENCING.

In addition to the historical bases for applying speedy trial rights to sentencing, the practical considerations that animate that right require comparable protection at sentencing. *Barker* v. *Wingo* specifies three "interests of defendants which the speedy trial right was designed to protect": preventing oppressive pretrial incarceration, minimizing the anxiety and concern of the accused, and limiting the possibility that delay will impair preparation of the defense. 407 U.S. at 532. Each of these interests warrants the same protection against inordinate sentencing delay, especially for the 95% of those defendants who have pleaded guilty, and for whom sentencing is their crucial—and only—"day in court."

A. Extended Pre-Sentence Incarceration Is Oppressive.

While awaiting the sentencing phase of trial, as with awaiting the guilt-determination phase, a prisoner in custody is typically held in a jail,[3] a facility not designed for extended stays. See Marie Gottschalk, *Bring It On: The Future of Penal Reform, The Carceral State, and American Politics*, 12 Ohio St. J. Crim. L. 559, 581 (2015). It is not until an inmate is finally sentenced that he goes to a prison or other correctional facility. The harmful consequences of this extra time spent in jail, as opposed to a prison or other correctional facility, include deplorable conditions, inadequate medical care, and the lack or rehabilitation and betterment programs.

1. *Deplorable conditions.* "[J]ails have a well-deserved reputation as the 'worst blight in American corrections'" for many reasons. Gottschalk, *supra*, at 581 (quoting Margo Schlanger, *Inmate Litigation*, 116 Harv. L. Rev. 1555, 1686 n. 434 (2003)). First, the vast majority of jails are overcrowded. See Kevin R. Reitz, *The "Traditional" Indeterminate Sentencing Model*, *in* The Oxford Handbook of Sentencing and Corrections, 270, 290 (Joan Petersilia & Kevin R. Reitz, eds. 2012). "Overcrowded jails can be tense powder kegs, where safety of staff and inmates can be in jeopardy." Lt. Gary F. Cornelius, *Jails, Pre-Trial Detention, and Short Term Confinement*, *in* The Oxford Handbook of Sentencing and Corrections 389, 405 (Joan Petersilia & Kevin R. Reitz, eds. 2012). Se-

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[3] This Court has recognized the right to a speedy trial even for those out on bail. *See, e.g., United States* v. *MacDonald*, 456 U.S. 1, 8 (1982) ("The speedy trial guarantee is designed . . . to reduce the lesser, but nevertheless substantial, impairment of liberty imposed on an accused while released on bail . . . .").

cond, jails hold "the full spectrum" of people, "a mixture of dangerous, violent individuals merged in with marginalized individuals." Kim English, et al., *Sexual Assault in Jail and Juvenile Facilities: Promising Practices for Prevention and Response, Final Report*, at 151 (June 2010).[4] Third, jails often are unable "to separate prisoners by security risk . . . ." Gottshalk, *supra*, at 581 n. 102. As this Court has explained, this means that "[j]ails can be even more dangerous than prisons because officials there know so little about the people they admit at the outset." *Florence* v. *Bd. of Chosen Freeholders of Cty. of Burlington*, 132 S. Ct. 1510, 1521 (2012). Finally, even when officials know which inmates should be separated from one another for safety reasons, jails lack the facilities to do so. See, *e.g.*, English, *supra*, at 150 (describing "space for separation in housing" as the "most important" condition in jail "requir[ing] immediate attention"). It is harmful to leave a prisoner in such an environment for any longer than is necessary to hand down his sentence.

2. *Inadequate medical care.* Jails are "[d]esigned and intended to house short-term, transient populations" and therefore cannot provide the necessary medical care to inmates for extended periods of time. Gottshalk, *supra*, at 581. Consequently, when sentencing is delayed, inmates are forced to remain in facilities unable to provide adequate medical care. This is particularly problematic because a large percentage of jail inmates requires medical attention. See Dept. of Justice, Bureau of Justice Statistics, L. Maruschak, et al., *Special Report, Medical Problems of State and Federal Prisoners and Jail Inmates*

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[4] *Available at* http://www.ncdsv.org/images/CDCJ_SAinJailAndJuvenileFacilities_11-2011.pdf.

(2015) (hereinafter "*Special Report*"). One of every two of jail inmates (50.2%) has a chronic medical condition.[5] *Id.* at 5. One in seven jail inmates reported having an infectious disease.[6] *Id.* at 4. And 1.3% reported having HIV or AIDS, a rate more than four times that in the general U.S. population. *Id.*

In juxtaposition to this great need, only 46.5% of jail inmates even saw a healthcare professional while incarcerated, compared to 79.9% of prison inmates over the same period of time. *Id.* at 9. While 93.6% of prison inmates were tested for tuberculosis, only 53.9% of jail inmates were tested. *Id.* These medical issues are necessarily exacerbated because prisoners are staying in jail for extended times, especially due to sentencing delays.

Nearly 1.5 million inmates, 65% of all incarcerated persons in the United States, meet the DSM-IV medical criteria for alcohol or other drug addiction. See Nat'l Ctr. on Addiction and Substance Abuse at Columbia University, *Behind Bars II: Substance Abuse and America's Prison Populations*, i (Feb. 2010) (hereinafter "*Behind Bars II*"). Prison inmates, however, are three times more likely to receive professional treatment for substance abuse or addiction-related services than jail inmates, over the same period of time. *Id.* at 40. Furthermore, 39.7% of federal and 36% of state prison inmates received other addiction-related services, while only 13.1% of jail inmates received such services, over the same period of time. *Id.*

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[5] Chronic conditions include cancer, problems related to stroke, kidney-related problems, cirrhosis of the liver, heart-related problems, diabetes, arthritis, asthma, and high blood pressure. *Special Report* at 1.

[6] Infectious diseases include tuberculosis, hepatitis B, hepatitis C, and other sexually transmitted diseases. *Id.* at 1.

The last year alone provides numerous examples of jails providing inadequate medical care to those incarcerated there. James Pinkerton, et al., *Harris County Jail considered 'unsafe and unhealthy' for inmates, public*, Hous. Chron, Nov. 21, 2015 (describing inadequate medical care at Harris County jail, including failure to give diabetic prisoners insulin for days at a time and fatalities due to failure to treat routine bacterial infections);[7] M. Scott Carter, *The Latest Plague of Sewage at the Okla. County Jail*, Okla. Watch, June 24, 2015 (describing unsanitary conditions);[8] Meredith Cohn, *Baltimore jail complex again faces lawsuit over health care*, Balt. Sun, June 3, 2015 ("For example, detainees who had controlled HIV became sick again, diabetics suffered dangerous levels of glucose, and those with hypertension had spiking blood pressure.").[9]

3. *Few rehabilitation and betterment programs.* Unlike prisons, most jails do not have rehabilitation and betterment programs. See *Behind Bars II* at 52. About half of state and federal prison inmates participate in betterment programs, compared to a mere 12% of jail inmates who participate in such programs. *Id.* And for the few jails that do have such programs, the programs "are more restrictive and limited in jails than in prisons." See Cornelius, *supra*, at 404.

This is especially harmful to a person awaiting sentencing because completion of such programs is a re-

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[7] *Available at* http://www.houstonchronicle.com/news/Houston-texas/houston/article/Harris-County-Jail-is-unsafe-and-unhealthy-for-6649163.php

[8] *Available at* http://oklahomawatch.org/2015/06/24/the-latest-plague-of-sewage-at-the-oklahoma-county-jail/

[9] *Available at* http://www.baltimoresun.com/ health/bs-hs-jail-health-20150602-story.html

quirement for early release in the majority of states. Alison Lawrence, *Cutting Corrections Costs Earned Time Policies for State Prisoners*, Nat'l Conference Of State Legislatures, 1 (July 2009) (discussing policy of 31 states to provide incentive of early release based on participation in betterment and rehabilitation programs). The lack of programming for jail-confined prisoners also carries societal costs, as these rehabilitation and betterment programs have been proven not only to shorten time served, but also to reduce rates of recidivism. See *Behind Bars II* at 5.

B. Delays In The Sentencing Phase Of A Trial Exacerbate Anxiety And Concern.

Barker mandates "minimiz[ing] anxiety and concern of the accused." *Barker*, 407 U.S. at 532. Yet anxiety and concern continue to persist after a trial concludes or, for over 95% of defendants, after a plea is entered. For most persons convicted of a crime, the largest question remains: What is my sentence? The answer is uncertain until the conclusion of the sentencing phase of trial, as sentences vary substantially. Judges in both state and federal courts have substantial discretion in the sentences they impose, even where pursuant to a plea, which leads to uncertainty—and substantial anxiety and concern—regarding the nature and length of incarceration. Hon. Michael A. Wolff, *Evidence-Based Judicial Discretion: Promoting Public Safety Through State Sentencing Reform*, 83 N.Y.U. L. Rev. 1389 (2008); Neal B. Kauder & Brian J. Ostrom, *State Sentencing Guidelines Profiles and Continuum*, Nat'l Ctr. For State Courts (July 2008).

As an example of the degree of uncertainty possible, consider *Alleyne*, 133 S. Ct. at 2163. There, "the sentencing range supported by the jury's verdict was five years' imprisonment to life"—in other words, the dif-

ference between being free in time to see your newborn's first day of kindergarten and dying incarcerated.

C. Delays In The Sentencing Phase Of Trial Impair Defendants' Abilities To Exercise Their Legal Rights With The Courts.

Delays in sentencing result in "the inability of a defendant adequately to prepare his case," including his sentencing phase of trial and his appeal, which "skews the fairness of the entire system." *Barker*, 407 U.S. at 532. The negative effects concerning a defendant's ability to prepare his sentencing case manifest themselves by (1) undercutting a defendant's ability to challenge enhancements and to present mitigation evidence, (2) chilling a defendant's ability to serve concurrent sentences, and (3) undermining a defendant's ability to appeal his conviction or sentence.

1. *Challenging enhancements and introducing mitigation evidence at sentencing.* The end of the guilt phase does not obviate a defendant's need for evidence to put on a defense. To the contrary, even after a defendant pleads guilty, the prosecution may argue at the sentencing hearing for upward enhancements and adjustments respecting the appropriate sentence. Whether such enhancements are available depends on whether the prosecution can prove, often by only a preponderance of the evidence, one or more of numerous aggravating factors and circumstances associated with the commission of the offense. Such enhancements can be significant, and they therefore require a serious defense. Indeed, depending on the resolution of the factual dispute over enhancements, the length of a person's incarceration for a given crime may vary by decades.

For example, under *Federal Sentencing Guidelines Manual* § 2B1.1 (U.S. Sentencing Comm'n 2015), a court's determination of fact issues at the sentencing hearing can transform a relatively short sentence of 12 months or fewer into a sentence of 5, 10, or 20 years, all turning on findings regarding, *inter alia*, the amount of the loss, *id.* § 2b1.1(b)(1); how many victims were affected, *id.* § 2b1.1(b)(2); whether those suffered "substantial financial hardship," *id.*; whether the fraud "would benefit a foreign government, foreign instrumentality, or foreign agent," *id.* § 2b1.1(b)(13)(B); and whether the fraud "substantially endangered the solvency or financial security of . . . a publicly traded company, *id.* § 2b1.1(b)(16)(B). The same is true for much of the rest of the federal sentencing guidelines. See, *e.g.*, *id.* § 3B1.1(b) (requiring a greater sentence when "the defendant was a manager or supervisor (but not an organizer or leader) [of a] criminal activity [that] involved five or more participants or was *otherwise extensive*" (emphasis added)); *id.* § 3B1.3 (requiring a greater sentencing "[i]f the defendant abused a position of public or private trust, or used a special skill, in a manner that significantly facilitated the commission or concealment of the offense").

The facts of *United States* v. *Patrie*, 794 F.3d 998, 1000-01 (8th Cir. 2015), *petition for cert. filed* (U.S. Oct. 8, 2015) (No. 15-6468), illustrate starkly how facts developed at a sentencing hearing can alter a sentence. There, the defendant pleaded guilty only to being a felon in possession of various firearms, which would translate into a sentence of approximately 10 years. *Id.* At sentencing, however, the prosecution accused defendant of also having committed first degree murder, and sought a guidelines enhancement on that basis. *Id.* The district judge found, by a prepon-

derance of the evidence, that the defendant had committed the alleged murder and held that the cross reference for first degree murder was therefore appropriate, resulting in a Guidelines sentence of life imprisonment. *Id.*

As these examples show, defendants need evidence to defend themselves at sentencing and, where applicable, to put on an affirmative mitigation case. That evidence may prove vital to a defendant's ability to limit the sentence to be imposed. But, just as with delays in the guilt phase of trial, delays in the sentencing phase make putting on such a defense or mitigation argument much harder, as defendants must grapple with fading memories, missing witnesses, and other forms of stale evidence. See *Doggett* v. *United States*, 505 U.S. 647, 654 (1992); see also *Barker*, 407 U.S. at 533 ("[I]f a defendant is locked up, he is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense."). Delays are especially detrimental at the sentencing phase because while in jail, many defendants become even further disconnected from fact witnesses and mitigation witnesses, such as family members, teachers, and clergy, many of whom may grow less and less inclined as time passes to testify on behalf of a person whose guilt has been determined.

2. *Preclusion of concurrent sentences.* Delays in sentencing often mean that a defendant will not be able to serve sentences concurrently. As this Court acknowledged in *Smith* v. *Hooey*, undue and oppressive incarceration can result when "the possibility that the defendant already in prison might receive a sentence at least partially concurrent with the one he is serving may be forever lost . . . ." 393 U.S. 374, 378 (1969). This harm results not only from delay of adjudication as to guilt, but from delay of sentencing as

well. See *United States* v. *Seltzer*, 595 F.3d 1170, 1179 (10th Cir. 2010) (violation of speedy trial where Federal prosecution delayed, without cause, until defendant had served full state sentence); *Prince* v. *Alabama*, 507 F.2d 693, 707 (5th Cir. 1975) ("[I]t was at least possible that his sentence might have run in part concurrently with his California sentence. That possibility was forever foreclosed by Alabama's election to postpone prosecution until Prince's release from the CDC."); *Edmaiston* v. *Neil*, 452 F.2d 494, 497 (6th Cir. 1971) (discussing "loss of concurrent sentencing possibilities" as a "type[] of 'oppressive incarceration'").

3. *Bringing appeals.* Delays in sentencing are particularly prejudicial for defendants planning to appeal, because defendants cannot challenge either their convictions or their sentences until their sentences are handed down. In federal court, a notice of appeal is not recognized until after entry of judgment, see Fed. R. App. P. 4(b), and "judgment," of course, includes the sentence, Fed. R. Crim. P. 32(k)(1); see also *Burton* v. *Stewart*, 549 U.S. 147, 156 (2007) (same for state-court convictions). For a vindicated defendant whose sentencing phase had extensive delays, the injustice is obviously egregious. This potential problem is hardly infrequent: 6.1% of all federal criminal appeals are successful. Such an appeal would largely be for naught if, because of sentencing delays, the appellant's sentence had largely (or completely) run before he could be vindicated on appeal. See *U.S. Court of Appeals Federal Judicial Caseload Statistics*, tbl. B-5 (Mar. 31, 2014).[10]

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[10] *Available at* http://www.uscourts.gov/statistics/table/b-5/federal-judicial-caseload-statistics/2014/03/31.

III. THE DUE PROCESS CLAUSE INSUFFICIENTLY PROTECTS THE RIGHTS GUARANTEED BY THE SPEEDY TRIAL PROVISION OF THE SIXTH AMENDMENT.

Unlike due process violations, speedy trial violations do not require a showing of actual prejudice. "[*Barker*] expressly rejected the notion that an affirmative demonstration of prejudice was necessary to prove a denial of the constitutional right to a speedy trial . . . ." *Moore*, 414 U.S. at 26. "The Sixth Amendment right to a speedy trial is thus not primarily intended to prevent prejudice to the defense caused by passage of time; that interest is protected primarily by the Due Process Clause and by statutes of limitations." *MacDonald*, 456 U.S. at 8. As with the Right to a Jury Trial, which offers its protection regardless of rationality of jury verdicts, the Right to a Speedy Trial offers its protection regardless of having to show actual prejudice. Cf. *Ring* v. *Arizona*, 536 U.S. 584, 607 (2002) ("The Sixth Amendment jury trial right, however, does not turn on the relative rationality, fairness, or efficiency of potential factfinders.").

The right to a speedy trial, as a right independent of due process, is especially critical at sentencing because actual prejudice from delay of the sentencing phase is not easily proven. *Barker*, 407 U.S. at 532. This is especially so for the defendants who stand to suffer the greatest prejudice—those who are wrongfully convicted. A defendant cannot appeal a conviction until sentencing is complete. If the defendant is vindicated on appeal, the prejudice suffered from having unnecessarily endured a prolonged and wrongful incarceration obviously would be immense. But demonstrating that prejudice before appeal would be

nearly impossible, and proving it afterward would be an empty gesture.

CONCLUSION

The judgment of the Supreme Court of Montana should be reversed.

Respectfully submitted,

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